RIVIERA BAY RESORT & CONDO MANAGEMENT SDN BHD

v.

SRI RIMBA MENTARI DEVELOPMENT SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-43-2004]
17 MAY 2005

CIVIL PROCEDURE: *Pleadings - Amendment of - Delay in applying for amendment - Whether inordinate - Whether shows lack of good faith - Whether prejudicial - Whether granting of application would re-open entire hearing before Sessions Court - Subordinate Courts Rules 1980, O. 15 r. 1(1)*

This was an appeal by the appellant/defendant against the decision of the Sessions Court dismissing its application to re-amend its summons and claim against the respondent/plaintiff. The issue for determination was whether the judge had correctly exercised its discretion on the basis of submissions on delay and prejudice.

Held (dismissing the appeal with costs):

[1] The unexplained delay of some two and a half years from appellant's date of filing the counterclaim on 7 September 2001 to the date of application for amendment on 26 April 2004 qualified as inordinate delay and was lacking in *bona fides.* The appellant's application, if granted, would result in having to re-open the entire hearing before the Sessions Court as the amendment was subject to, *inter alia*, service on the respondent and other consequential procedural steps to be followed under O. 15 of the Subordinate Courts Rules 1980. The respondent would have been prejudiced as it had already obtained judgment in its favour. (pp 958 c & 959 f-h)

Case(s) referred to:

Angle Cake House Sdn Bhd & Ors v. Bandaraya Development Bhd [2001] 1 CLJ 746 HC ***(refd)***

Chen Chow Lek v. Tan Yew Lai [1983] 1 CLJ 123; [1983] CLJ (Rep) 79 FC ***(refd)***

Gurbachan Singh & Ors v. T/n Muthu & Lee & Anor [2001] 2 CLJ 173 HC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Looi Guan Kway v. Low Lean Bok & Ors [1938] MLJ 35 ***(refd)***

Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Ors [2003] 1 CLJ 790 HC ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***
Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] CLJ 544; [1982] CLJ (Rep) 326 FC ***(refd)***
Skrine & Co v. MBf Capital Bhd & Anor [1983] 3 MLJ 649 ***(refd)***
Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals [1999] 4 CLJ 651 HC ***(refd)***
Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 CA ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 ***(refd)***
Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 2 MLJ 21 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 15 r. 1(1)

For the appellant - Zairin Dzainal Abidin; M/s Taye Co
For the respondent - WP Leong; M/s WP Leong & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-defendant ("Riviera") against the decision of the learned sessions court judge who had on 6 July 2004 dismissed with costs Riviera's application in encl. (22) to re-amend Riviera's summons and claim ("encl. (22)") against the respondent-plaintiff ("Sri Rimba").

The terms sought in encl. (22) are:

1. The amount claimed be amended from RM26,624.86 as at 1 August 2001 to RM26,344.86; and

2. Arrears to accrue and continue from 1 August 2001 to be assessed at the trial.

Vide an order of this court granted on 10 June 2003 pursuant to originating summons No. 24-416-2002, the respective claims of Sri Rimba against Riviera and *vice versa* are to be heard together, whereby Riviera is to be designated as the defendant, while Riviera's claim is to be dealt with as a counterclaim.

Factual Background

On 7 September 2001, Riviera had commenced summons No. (2)-52-648-2001 against Sri Rimba for the sum of RM26,624.86 being arrears of administrative fees, quit rent, insurance premium, air-conditioning charges, water and electricity.

On 6 November 2001, Riviera filed the first application for amendment which is not the subject matter of this appeal. Riviera's second application for re-amendment in encl. (22) was filed on 26 April 2004, some two and a half years later.

Meanwhile, the full trial was completed on 12 April 2004. Written submission by Riviera was filed on 22 April 2004, while Sri Rimba's submission was filed on 26 April 2004, with Riviera's final reply filed on 7 May 2004. Decision was to be delivered on 17 May 2004 which was also the date of hearing for Riviera's application in encl. (22), on which Riviera has presented the submission, while Sri Rimba was asked to file written submission on 8 June 2004, with the final reply by Riviera on 10 June 2004.

In the circumstances, decision on the full hearing of the main action had been rescheduled for 5 July 2004 and the decision on encl. (22) which was scheduled for 21 June 2004 had been rescheduled for 6 July 2004.

On 5 July 2004, judgment was delivered, and Sri Rimba's claim was allowed with costs while Riviera's counterclaim was dismissed with costs.

On 6 July 2004, Riviera's application in encl. (22) was dismissed with costs. Hence, this appeal by Riviera before me.

Exercise Of Discretion

Miss Zairin Dzainal Abidin, learned counsel for Riviera, did not deny that there was delay in filing encl. (22) but submitted that Sri Rimba has not been prejudiced thereby, relying on O. 15 r. 1(1); *Looi Guan Kway v. Low Lean Bok and Ors.* [1938] MLJ 35 HC; *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] 1 MLJ 213 FC; *Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Ors* [2003] 1 CLJ 790 HC; *Yoong Leok Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21; *Chen Chow Lek v. Tan Yew Lai* [1983] 1 CLJ 123; [1983] CLJ (Rep) 79; *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] CLJ 544; [1982] CLJ (Rep) 326; and *Skrine & Co. v. MBf Capital Bhd & Anor* [1983] 3 MLJ 649.

For Sri Rimba, learned counsel Mr. W.P. Leong contended that the learned sessions court judge had correctly exercised the discretion in dismissing encl. (22) and the court acting in an appellate capacity should be slow in interfering.

He added that Riviera had caused the unexplained delay of two and a half years in filing encl. (22), which has prejudiced Sri Rimba in that Riviera is seeking a second bite after Riviera's counterclaim has been dismissed.

From the above submissions, I observe a common denominator ie, the power of the court in granting or refusing leave to amend the pleading would involve an exercise of discretion, as contained in O. 15 r. 1(1) of the Subordinate Courts Rules 1980 in the following words:

> Subject to Order 8, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his summons, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

A reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Courts Rules 1980 unless otherwise stated.

In my judgment, it is to be noted that the discretion is a judicial discretion which is not to be exercised capriciously or unreasonably, but judicially having regards to established judicial principles, giving due consideration to all the facts and circumstances in each particular case.

For this purpose, an analysis of the governing principles enunciated in the authorities cited for Riviera may prove illuminating.

Governing Principles

1. The general principle is that amendments should always be allowed provided that:

   (1) There is *bona fides* on the part of the applicant;

   (2) They would cause no prejudice to the other side which cannot be compensated by costs; and

   (3) They are not such as to turn a suit of one character into a suit of another and inconsistent character (per Aitken J in *Looi Guan Kway, supra*, at p. 37 F-G left column; per Mohamed Azmi FJ in *Yamaha Motor, supra*, at pp. 214 I-215 A; as followed eg, in *Public Bank Bhd, supra*, at p. 798 b.);

2. An amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim: per Mohamed Azmi FJ in *Yamaha Motor, supra*, at p 215 B-C left column; per Abdul Hamid Ag LP (later CJ (Malaysia) in *Hock Hua Bank, supra*;

3. As the expression "at any stage of the proceedings" is very wide, an amendment may be allowed even at the conclusion of the trial: per Abdul Hamid FC (later CJ Malaysia) as applied in *Public Bank, supra.*

Having considered the aforesaid submissions, and in the light of the above governing principles, I am of the view that the issue for determination in this appeal is whether the learned sessions court judge has correctly exercised the discretion in dismissing encl. (22), on the basis of the submissions on delay and prejudice.

Delay

This is one of the decisive factors, as has been demonstrated by our courts.

In *Public Bank, supra*, the plaintiff applied for leave to amend its writ and statement of claim. There was a delay of nine months from the date of auction to the date of the completion of sale. The defendant objected to the application on two grounds, one of which was delay. I held, *inter alia*, that the lapse of nine months did not constitute such an inordinate delay as to seriously affect the merits of the application.

On the other hand, in the following cases, leave to amend was refused on ground of delay resulting in a lack of *bona fides*:

1. *Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703 CA per Haidar Mohd Noor JCA (later CJ(M)) – four years after the commencement of the action;

2. *Angle Cake House Sdn Bhd & Ors v. Bandaraya Development Bhd* [2001] 1 CLJ 746 HC per Tee Ah Sing J – more than 10 years;

3. *Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan And Other Appeals* [1999] 4 CLJ 651 HC per Clement Skinner JC (now J) – 12 years from the filing of suit to the date of application;

4. *Gurbachan Singh & Ors v. T/n Muthu & Lee & Anor* [2001] 2 CLJ 173 HC per Su Geok Yiam JC (now J) – three-year delay, after a dissolution of injunction and removal of caveat; and

5. *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830 CA, per Haidar Mohd Noor JCA (later CJ (M)) – defence was filed on 9 September 1996 and application for leave to amend defence was filed on 3 September 1999, causing a three-year delay.

In the instant appeal, I am of the view that the unexplained delay of some two and a half years from Riviera's date of filing the counterclaim on 7 September 2001 to the date of application for amendment on 26 April 2004 would certainly qualify for inordinate delay and hence lacking in *bona fides*.

Prejudice

As the correct or erroneous exercise of discretion in this respect must be determined by reference to all the facts and circumstances of each particular case, I consider it appropriate to revisit the authorities cited for Riviera in order to see the manner in which the discretion has been exercised by our courts.

In *Looi Guan Kway, supra,* the plaintiff had filed a confused and complicated plaint (now termed statement of claim). Before his suit came on for trial, the plaintiff filed a motion for judgment against the third defendant. The motion was ordered to stand over until the plaint was amended, but the plaintiff's application to amend the plaint was not allowed by Aitken J.

The facts in *Yamaha Motor, supra,* show that after the pleadings were closed, the appellants applied for leave to amend the amended statement of claim, which was dismissed by the High Court Judge, but on appeal, the Federal Court held that High Court Judge had not exercised his discretion judicially, and so the appellants were given leave to amend their amended statement of claim.

An amendment was allowed to be made to the statement of claim after the parties had closed their respective cases and made their submissions as opportunity was given by the learned trial judge to the appellant to recall any of the witnesses who had already testified. This was affirmed by the Federal Court: *Yoong Leok Kee Corporation, supra.* It must be observed that judgment of the court had not been given in the full trial.

Where the amendment to the statement of claim has already been fully covered by evidence in the records and not in any way prejudicial to the respondent, the Federal Court granted leave to amend: *Chen Chow Lek, supra*, per Salleh Abas FJ (later LP).

In *Hock Hua Bank, supra*, the then Supreme Court in a majority judgment, separately delivered by Abdul Hamid Ag LP (later CJ Malaysia) and Syed Agil Barakbah SCJ (as he then was) held that the court has the power to grant an amendment to the statement of claim, after the expiry of the limitation period. The writ was issued on 8 October 1980 and the application for amendment was filed on 3 December 1984. No hearing of the action has commenced and so no judgment has been delivered.

Siti Aisha, supra, cited for Riviera, has nothing to do with the granting or refusal of leave to amend pleadings.

In *Skrine & Co, supra*, in the writ and statement of claim, the plaintiffs quantified the damages for a total claim of RM60 million against the first and second defendants. The first defendant sought to amend his defence at the interlocutory stage, which the learned first instance judge refused on the ground that the amendments had introduced a new plea. In allowing the appeal, Gopal Sri Ram JCA spoke for the Court of Appeal and held that the discretion had been wrongly exercised by the court below.

Amendments to the defence which merely explain or expand within permitted limits of the case already pleaded by the defendant have been allowed: per Gopal Sri Ram JCA in *Skrine & Co, supra*, at pp 672 A and 673 B.

Reverting to the facts of the case before the sessions court, it is crucial to note that when judgment in the main action has been given against Riviera, application for amendment was heard the next day. Riviera's application, if granted, would result in having to reopen the entire hearing before the sessions court as the amendment is subject to, *inter alia*, service on Sri Rimba and other consequential procedural steps to be followed under O. 15. This would certainly amount to a second bite at the proverbial cherry; and cause prejudice to Sri Rimba which has already obtained judgment in its favour. Further, the granting of leave to amend would open the floodgates which are likely to motivate other parties, whose claim or counterclaim has been dismissed, to persist in making similar applications whereby proceedings would persist ad infinitum. This certainly cannot be the intention of the Rules Committee expressed in O. 15 r. 1(1).

In the circumstances, I am of the view that the court below has properly and correctly exercised the discretion in refusing leave to amend.

Conclusion

In view of the foregoing grounds, I am unable to find any merit in this appeal which is hereby dismissed with costs.